DOCUMENT RESUME

ED 168 440 HE 011 162

AUTHOR Frank, Steven
TITLE After "DeFunis": Affirmative Action and the Jewish Community. Analysis, No. 46.
INSTITUTION Synagogue Council of America, Washington, D.C. Inst. for Jewish Policy Planning and Research.
PUB DATE 30 Sep 74
NOTE 9p.; Best copy available

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Admission Criteria; *Affirmative Action; Civil Rights; *College Admission; Employment Practices; *Equal Education; Equal Opportunities (Jobs); Government Role; Higher Education; *Jews; Quotas; *Reverse Discrimination
IDENTIFIERS *DeFunis Case; Selective Admission

ABSTRACT

The problems raised by the development of affirmative action and by the Jewish community's response to the complex social and legal issue are analyzed. The analysis focuses upon: initiation of affirmative action by presidential decree and its interpretation and implementation by the Department of Health, Education, and Welfare in the areas of college admission and hiring; the response of various segments of the Jewish community toward affirmative action's questionable turn toward preferential treatment and quotas, including the form of the response, its effectiveness, and what it reveals about being Jewish in America today; and the future of affirmative action and the role group interests should play in society. The analysis also attempts to draw attention to current circumstances that seem to provide an unusual opportunity for constructive action in the near future. Although the major Jewish organizations were firm backers of affirmative action in its neutral non-discrimination phase, they filed complaints when affirmative action provided preferential treatment and quotas. The failure of the bureaucracy to respond in a serious manner to the problem of reverse discrimination led to the "DeFunis" case in the Supreme Court. The Jewish organizations go beyond merely rejecting the legal institution of group rights; they are also critical of the ethnocentricity implicit in the very suggestion of group rights. The larger problem of balancing group interests and individual rights is considered. (SW)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

FILE COPY - DO NOT REMOVE

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

analysis

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Institute for Jewish Policy Planning
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND THE ERIC SYSTEM CONTRACTORS."

No. 46
September 30, 1974
14 Tishri 5735

Copyright 1974 by the Institute for Jewish Policy Planning and Research of the Synagogue Council of America
1776 Massachusetts Avenue, N.W.
Washington, D.C. 20036

BEST COPY AVAILABLE

ED168440

HE 011 162

After *DeFunis:* Affirmative Action and the Jewish Community

Steven Frank

The turmoil over affirmative action, preferential treatment, proportional representation and quotas, which boiled over in the recent *DeFunis* case, has somewhat subsided now. Thoughtful individuals and organizations who have been caught up in the controversy are taking time to absorb the lessons of the past several years and to plan future policy. One group that has been an almost unwilling participant in the battle has been the Jewish community, which has perceived its interests to be threatened by abuses of legitimate affirmative action programs. It is now an opportune time to analyze the problems raised by the development of affirmative action and by the Jewish community's response to this complex social and legal issue. In the hope of facilitating future planning, this analysis will focus upon:

(a) the initiation of affirmative action by Presidential decree and its interpretation and implementation by the Department of Health, Education, and Welfare in the areas of college admission and hiring;

(b) the response of various segments of the Jewish community toward affirmative action's questionable turn toward preferential treatment and quotas — considering the form of the response, its effectiveness, and what it reveals about being Jewish in America today;

c) the future of affirmative action and the role group interests should play in society, an issue this controversy has underscored.

Finally, this analysis will attempt to draw attention to current circumstances that seem to afford an unusual opportunity for constructive action in the near future.

Development of Federal Policy: From Equal Opportunity to Equal Results

It would be premature to attempt to write the complete story of affirmative action. The final chapter lies ahead. However, its evolution from the early 1960's is now history. The milestones of that history must be recalled in order to elucidate today's "quota" controversy. For those whose concern it is to evaluate the current situation and plan future policy, it is necessary to understand for what reason, and, in what manner affirmative action developed.

President Kennedy's choice of the words "affirmative action" to describe the concept under discussion was an appropriate one. It aptly summed up a more activist approach to righting the wrongs of racial discrimination than had previously been attempted. In 1954, in the landmark civil rights case of *Brown v. Board of Education*, the Supreme Court set the nation to the task of ending segregation in the public schools. Then it was thought that mere non-discrimination would erase the lines that divided the country into racial castes. For a decade, the Court operated on the assumption that simply by removing the "Whites Only" signs, blacks would be able to proceed from exclusion to inclusion, from segregation to integration, from inequality to equality. The mandate of *Brown* was negative, stop discriminating; and the mandate was cautious, stop discriminating "with all deliberate speed."

The years of segregation, however, had built up such deeply-rooted patterns and had so institutionalized discrimination in virtually every aspect of American life that the progress toward desegregation was much more deliberative than speedy. For those concerned about equal rights, the slow pace became unacceptable in the early 1960's. Passive, non-discrimination seemed anachronistic and, increasingly, unrealistic. As a result, more direct, active, and affirmative methods were devised such as controversial busing and affirmative action programs.

Still, more was involved than simply impatience with tardy means of achieving agreed-upon goals. The shift in methods actually reflected a dramatic shift in the goal sought. The original goal of equality of opportunity seemed to civil rights advocates to be just as unsatisfactory as the original method, passive non-discrimination. What the times demanded, they said, was not an equal start, but a tie at the finish. The goal shifted to equality of results. What was needed was not potentially integrated schools but integrated schools. Furthermore, it was disingenuous to claim that black students had the opportunity to attend formerly all-white schools if housing patterns prevented them from doing so. Thus, the revised goal joined with the new methods to create busing to achieve "racial balance" in the public schools, and affirmative action to achieve "reasonable representation" in university employment and admissions. The shamefully slow pace of desegregation not

only led to the development of new remedies but also shaped and altered the end sought. It is no coincidence that Department of Labor affirmative action guidelines speak in terms of "goals and timetables." The language reflects the policy shift in direction and mode of transport: from equal opportunity to equal results, from non-discrimination to affirmative action.

It is clear that the slow pace of desegregation explains why more active, affirmative remedies were designed. The specific manner in which one such remedy, affirmative action, developed is clear, but essential to an understanding of the current problem. The actual legal authority for affirmative action is neither legislative nor judicial. Instead, it derives from a series of Executive Orders dealing with the employment practices of Federal government defense contractors. Here as well, the activist method was a late development. The original approach was non-discrimination.

The first such order was signed by President Roosevelt in June, 1941. It prohibited discrimination by defense contractors against employees because of race, creed, color or national origin. It was based on the President's war powers and its purpose was to enlarge the pool of workers available for defense production. Presidents Truman and Eisenhower continued this policy. It was President Kennedy, however, who initiated the more direct approach and coined the phrase which reflects this change. In March 1961, he signed Executive Order #10925 which required all government contractors to "*take affirmative action* to ensure that applicants are employed and that employees are treated during employment, without regard to their race, creed, color, or national origin." In September 1965, President Johnson signed Executive Order #11246 which repeated the earlier order's affirmative action requirements. President Johnson also transferred the enforcement provisions of the order to the Department of Labor. In turn, the Department of Labor was given the power to delegate its enforcement powers to other Federal agencies for coverage in specific areas. In this manner, the Office For Civil Rights in the Department of Health, Education, and Welfare was given enforcement powers with regard to colleges and universities.

Still, the Department of Labor retained the power to define affirmative action, which it did in an order in 1967 and a revised order in 1971. It is this definition, to be discussed below, which HEW and twenty-one other Federal agencies adopted for purposes of enforcing their non-discrimination regulations.

For the most part, affirmative action remained non-controversial during its incubation period in the early 1960's. The reasons for this are two-fold. First, as initially conceived, affirmative action was moderate and flexible. Consequently, it received broad support even from those who are now critical of the questionable turn it took in the 1970's. The earliest forms of affirmative action were quite limited in nature. The May 1968 Department of Labor Regulations (Code of Federal Regulations, Title 41, Chapter 60-1) include requirements for contractors to post non-discrimination statements in conspicuous places, include such statements in solicitations for employees, and to notify collective bargaining agents of the contractor's agreement not to discriminate. Enforcement was carried out by the contractor's supplying information and reports on employment practices and by Federal agency investigation. At the beginning, at least, affirmative action continued in the spirit of previous non-discrimination remedial practices. Only later did it undergo the fundamental transformation into "goals and timetables" which carried with it the implication of quotas and which generated such controversy. Second, during this early period, the economy was expanding so that it was possible to bring some into the system without at the same time excluding others. The philosophy of the time was to try, more equitably, to cut up an increasingly larger pie.

1971: Federal Regulations Redefine Affirmative Action

The turning point in the history of affirmative action came in 1971 it was redefined and accelerated at a time when the economy was contracting. On August 22, Professor John Kenneth Galbraith published his plan in the *New York Times Magazine* advocating that major firms be required to place a certain percentage of minority group individuals into $15,000 a year or more jobs.[1] This article seems to have provided the intellectual framework for affirmative action's turn toward proportional representation and quotas. An example of this trend can be found in a letter of October 13, signed by the President of Oberlin College, announcing the college's new policy of seeking minority representation among Oberlin students, faculty, and staff "approximately equal to the percentage of minority group members in the national population as a whole."

However, no sooner was it underway than the movement toward proportional representation and beneficial quotas for minorities raised the problem of reverse discrimination against members of non-minority groups — the majority. In September 1971, the now well-known *DeFunis* case started its journey to the Supreme Court when a state court ruled that the University of Washington had violated the equal protection clause of the Fourteenth Amendment by giving preference to minority applicants in its law school admissions policy.

But the impetus was in the other direction. This trend received the imprimatur of the government in December 1971 when the Department of Labor re-defined affirmative action requirements in its Revised Order #4 (Code of Federal Regulations, Title 41, Chapter 60-2): "An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies . . ." As Dr. Richard A. Lester in a report prepared for the Carnegie Commission on Higher Education observed, "Strict adherence to proper rules and procedures to ensure that women and members of minorities are widely encourged to apply for any job openings and are given equal opportunity for employment, training, promotion, and fair compensation no longer sufficed to meet compliance requirements."[2] Surely, a distinct change in the philosophy of affirmative action had occurred between the flexible posting, notification, and investigation requirements of 1967 and the numerical hiring goals with timetables attached of 1971.

The Federal agencies moved quickly to implement the new order, and universities, already under severe financial pressure, attempted to comply with the new regulations. HEW froze $138 million in Federal research contracts for Columbia University

because of its failure to come up with an acceptable plan. In September 1972, Columbia's 326-page affirmative action plan pledging to add 900 women and minority group members to its academic and non-academic staffs by 1977 was approved. The State University of New York at Stony Brook announced it would fill 100 faculty vacancies in the next three years with blacks, one-half of whom would be women. The University of California at Berkeley agreed to reserve 30 per cent of its Fall admissions for minority group members.[3]

The quota phenomenon even spread to politics. The Democratic Party conducted its 1972 Presidential convention under rules which called upon every state party to take "affirmative steps" to encourage participation by members of minority groups, women, and persons between the ages of eighteen and thirty in reasonable relation to their presence in the state. The added, politically-inspired category of young persons underscores the danger of the fragmentation of society inherent in the trend as each subgroup goes after its proportional piece of the pie.

In spite of the general rush toward proportionality, there were countervailing forces attempting to raise the deeper issues that needed to be resolved but were being largely ignored. Agencies representing the Jewish community made a major effort to bring these issues into the public forum as the 1972 election approached. Their role and the results of their efforts will be analyzed below.

At this point, it is useful to consider three questions with policy implications raised by the history of affirmative action. What authority made the decision to turn the country in the direction of proportional representation and quotas? What is the appropriate forum for making such policy decisions? Issuing from the authority affirmative action did, and evolving in the manner it did, what conflicting principles developed that remain to be resolved?

The first question raises the continuing problem of the delegation of authority to administrative agencies and the appropriate role of these agencies. Affirmative action, as it is conceived and implemented today, was not formulated by the legislative or judicial branch. As Dr. Lester notes, it has been "established and developed by Executive order, without Congressional consideration or endorsement. It is enforced exclusively by administrative-agency action."[4] Furthermore, the order from which it originally emanated is quite contrary to current practice in that the directive of the order was to make race irrelevant and not a primary consideration. Today's law is largely a product of the bureaucracy. It is certainly true that the Federal agencies have been given the authority to develop rather comprehensive regulations in a broad range of areas. However, it would be difficult to imagine another agency regulation which has so deeply touched so constitutionally sensitive an area as race and equality. The development of affirmative action suggests that where profound issues of public policy are concerned, there is need for tighter monitoring of the Federal agencies.

The primary responsibility for monitoring the agencies lies in the Executive branch. But the Nixon administration, undermined by scandal, was unable to provide the needed leadership. Part of the responsibility for monitoring the agencies lies with Congress and the Courts. These institutions, with their input of the sentiment of the larger population and their concern for the larger legal and social issues involved, are appropriate forums for determining public policy. However, with Congress preoccupied and the Court avoiding the issue, the agencies have been setting their own course. As a result, it has been necessary, thus far, for critics of present affirmative action requirements to negotiate privately with HEW for better terms. It was the failure, however, of the Executive branch to adequately reconcile the conflicts inherent in HEW administration of both the affirmative action orders and the non-discrimination requirements of the Civil Rights Act of 1964 which led to attempts to resolve the issue in the courts.

Policy by Bureaucracy Leads to Conflict Between Regulations and Law

Policies of non-discrimination toward all and affirmative action toward some constituted a paradox, which, though of its own making, the bureaucracy seemed unable to resolve. Executive Order #11246 attempts to embrace both concepts of non-discrimination and affirmative action. But the non-discrimination requirements apply to all persons so that no person may be denied employment on grounds of race, while the affirmative action requirements apply only to women and minorities, defined by the Department of Labor as Negroes, Spanish-surnamed, American Indians and Orientals. The potential for misinterpretation and abuse is apparent in a situation where certain individuals seemingly must be employed because of their race, while at the same time other individuals must not be denied employment or dismissed because of their race.

Title VII of the Civil Rights Act of 1964, on the other hand, contains a broad prohibition against discrimination in employment on account of race. But it also prohibits the granting of any preferential treatment to make up for statistical underrepresentation. Section 703(j) of Title VII insists that

> "Nothing contained in this title shall be interpreted to require an employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer . . . in comparison with the total number or percentage of such race, religion, sex, or national origin in any community, state, section, or other area, or in the available work force in any community, state, section, or other area.

In interpreting Title VII in the case of *Griggs v. Duke Power* (1971), the Supreme Court held that "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed." Section 703(j) has applied to institutions of higher education since March 1972. This has put colleges and universities in the perilous position of having to choose between obeying Congress which has explicitly prohibited preference and HEW which implicitly requires preference. Given the immediate purse-string powers of HEW, the choice has not been an agonizingly difficult one for many.

The push toward proportionality raised other substantial but unanswered questions. What role would merit continue to play in society? Would it be replaced by more subjective criteria; by

racial and ethnic qualifications? What price should individuals pay for the compensation society as a whole owed to those it had disfavored? What protection should be afforded by law for group as opposed to individual rights? What social good or harm could come from the rising ethnicity that the move toward proportional representation highlighted? These and other fundamental questions were apparently neglected when policy was being planned. It remained for certain segments of the Jewish community, feeling their interests threatened by these new developments, to bring these issues to the surface.

Jewish Organizations File Complaints

Traditionally at the forefront of the battle to insure equality of opportunity, the major Jewish organizations were firm backers of affirmative action in its neutral non-discrimination phase. It was only when Revised Order #4 started the move in the direction of numerical goals and timetables that serious opposition began. In 1972, representatives of the Jewish community launched a two-front dialogue, with HEW and the major Presidential contenders.

In May 1972, representatives of six national Jewish organizations (the Anti-Defamation League, American Jewish Congress, American Jewish Committee, Jewish Labor Committee, Jewish War Veterans of the United States, and Agudath Israel of America) met with HEW Secretary Elliot Richardson. He asked for documentation of abuses in affirmative action on the part of college administrators. In August the six organizations sent a joint letter to the Secretary containing a list of thirty-three complaints from their files. They consisted of allegations of unlawful preferential treatment in college admissions and in faculty and administrative hiring. In three subsequent installments, December 1972, April 1973, and July 1973, an additional seventy-five complaints were submitted.

The complaints were consciously confined to instances where affirmative action had hardened into preferential treatment and quotas. They included complaints regarding admissions policies: the DeFunis case, a 20% quota for minority applicants at the University of Illinois Medical School, an experiment in quota-based admissions leading to a student body reflective of the racial composition of New York City at the State University of New York at Old Westbury. Altogether there were 33 complaints regarding University admission policies. Also included were complaints concerning faculty and administrative hiring which alleged preferential treatment, reverse discrimination, and the implementation of policies of proportional representation.

How did HEW respond to the joint efforts of six major Jewish organizations? It appointed an Ombudsman whose response led the Jewish organizations to recognize "the low priority which the Department accords to problems of reverse discrimination." Many of the complaints were dismissed out-of-hand. Others received only spotty investigation and partial replies. Some were never answered. Sixteen months after the first complaints were submitted, no response at all had been received with respect to the 33 instances of preferential treatment in admissions policies. This less than forthcoming response by HEW to specific cases contrasted with more successful efforts to bring pressure to bear on prospective policy.

Official HEW policy changed as the result of the dialogue that was opened with the Presidential contenders in the 1972 election. In August, Philip Hoffman, then President of the American Jewish Committee, wrote to both candidates urging them to reject categorically the use of quotas." Then President Nixon responded that "numerical goals, although an important and useful tool to measure progress which remedies the effects of past discrimination, must not be allowed to be applied in such a fashion as to, in fact, result in imposition of quotas, nor should they be predicated upon or directed towards a concept of proportional representation." Nixon further indicated he had asked all Departments for a review of their policies "to insure conformance with these views."[5] Democratic Presidential candidate Senator George McGovern also rejected the imposition of quotas. One effect of this exchange can be seen in the issuance of new HEW guidelines in October 1972. These guidelines specifically prohibited reverse discrimination, emphasize merit, stress good faith efforts rather than rigid numerical goals and relate affirmative action results to availability of labor pools rather than to gross percentage of groups in the population. It would seem that, at least, on the policy level a major change had been effectuated.

Yet how real was the change? Did Jewish pressure cause the Nixon administration and HEW in particular to back down on quotas and proportional representation? Or did they bring about a semantic policy change without actually affecting policy? The fact that the six Jewish organizations submitted 20 new complaints to HEW in April 1973 and 36 more in July indicates that even if the official language of the policy had changed, the implementation of that change had yet to take hold. In fact, instances of reverse discrimination, proportional representation, preferential treatment, and quotas continue to this day and the Jewish organizations continue to compile complaints. A current case involving CCNY is evidence that the concept of proportional representation is still very much alive. When 19 of the 79 applicants offered admission to its accelerated medical training program declined, a special subcommittee was convened to choose replacements from a waiting list. The subcommittee broke down the names on the list by racial categories and selected 19 replacements in the same ethnic ratio as the 19 who had declined admission.[6]

Lack of Response Leads Parties to Supreme Court

It is precisely because of the failure of the bureaucracy to respond in a serious manner to the problem of reverse discrimination that the *DeFunis* case was necessary. Furthermore, the profound legal questions involved could only be resolved definitively by the Supreme Court. The major Jewish organization thus turned their attention to the Court earlier this year and eagerly awaited its decision in late April. In examining the significance of the case, it must be determined, first, what was at issue, second, what are the implications of the Court's decision, and finally, how did the Jewish community respond and why?

In 1971, Marco DeFunis, a Phi Beta Kappa graduate of the University of Washington, was denied admission to the University's Law School. At the same time. 36 minority ap-

plicants with lower grades and test scores were admitted. Furthermore, 30 of the 36 minority candidates had grades and scores below the usual minimum cut-off level. This last group would have been summarily dismissed from consideration had the individuals included been white. But the admissions process was such that minority applicants were considered separately and not compared with non-minority applications. The result was an admissions policy admittedly based upon racial classifications. At issue was the constitutionality of such a procedure and whether it constituted unlawful reverse discrimination.

DeFunis filed suit against the University and the trial court in Seattle, holding that the University had violated the equal protection clause of the Fourteenth Amendment, ordered it to admit DeFunis. He was admitted, but the University appealed to the State Supreme Court which reversed the lower court's ruling. DeFunis then took his appeal to the U.S. Supreme Court, which agreed to hear the case. Justice Douglas issued an interim order which kept DeFunis in law school until the full Court could decide the case. However, during the nearly three years that it had taken for the case to work its way from the trial court to the Supreme Court, DeFunis had gone through law school and, at the time of the Court's decision, was about to graduate in a matter of months. The Court used this as an excuse not to confront and decide the difficult issues the case presented. Instead, relying on the technical point of "mootness," the Court concluded that there was no longer a "justiciable controversy" because however it ruled, DeFunis would still graduate.

The Courts's motives in so acting have been the subject of much speculation. It has been suggested that in not deciding, the Court, in effect, decided to allow the questionable practices to continue for a time. Thus, when the Court finally confronts the issue, minorities may have achieved broader representation in the professional schools, lessening the need for preferential treatment. On the other hand, it has been suggested that the Court preferred that this delicate problem substantively affecting educational policy be left to the University to resolve and so issued a moderate warning that "if the admissions procedures of the Law School remain unchanged, there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court . . ."

Douglas: Recognizing Cultural Diversity Without Racial Preferences

Those searching for clues as to how the Court might eventually rule on this issue have attached particular significance to Justice William O. Douglas' dissent. Douglas would have decided the case and he alone spoke to its merits. Douglas' dissent is given particular credence as he is a known civil rights judicial activist. On the other hand, Justice Douglas was not speaking for the full Court and one can only speculate how it would decide the merits of this issue. Furthermore, Justice Douglas could not find on the record before him that the University had violated the equal protection clause. Douglas also would accept more subjective admissions criteria than grades and test scores alone, particularly, if it could be proved, as he suggests, that the standardized Law School Admissions Test is culturally biased against minorities. Finally, Douglas was emphatic in voicing his faith in cultural diversity and pluralism: "The melting pot is not designed to homogenize people, making them uniform in consistency. The melting pot as I understand it is a figure of speech that depicts the wide diversities tolerated by the First Amendment under one flag." However, at the same time, Douglas was firm in insisting that admissions applications be considered "in a racially neutral way." He emphatically rejected racially preferential admissions and racial and ethnic proportionality in education and employment. "For, the purpose of the University of Washington cannot be to produce Black lawyers for Blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for the Irish. It should be to produce good lawyers for Americans . . ." With the caveats noted above, it is no wonder that the Douglas dissent has been hailed as a victory by the major Jewish organizations who supported DeFunis. For his view of a culturally diverse society without legally institutionalized racial and ethnic castes fully coincides with their own.

Jewish Organizations Divide on *DeFunis*

The representatives of the Jewish community were split in their response to the *DeFunis* case. The three major defense organizations, the Anti-Defamation League, American Jewish Committee, and American Jewish Congress each filed separate briefs on behalf of Mr. DeFunis. The Union of American Hebrew Congregations, the central body of Reform Judaism, and the National Council of Jewish Women joined in support of the University. It has been suggested that this diversity of views presented by the Jewish community was healthy. It showed that Jews are not unanimous on this issue and, more importantly, avoided the appearance of a monolithic Jewish front confronting Black interests. The fear of exacerbating Jewish-Black relations may well have been the key factor in the decision of the UAHC to support the University. The position taken by the National Council of Jewish Women points up an often overlooked but equally pressing part of this controversy. That is, affirmative action programs designed to benefit minorities and women will, of course, promote the interests of Jewish women as well. For when it is noted that Jews are overrepresented in American society, the reference is generally to Jewish males. Jewish women feel they have more to gain by identifying as women in this case. The organizations that supported Mr. DeFunis can point to the statistics (even though they are male-oriented) to explain their concern. Jews represent only 2.9 percent of the U.S. population and yet nearly 9 percent of college faculty are Jewish — nearly 20 percent of faculty at elite and Ivy League colleges. Furthermore, nearly 80 percent of Jewish students of college age attend college. Given this statistical overrepresentation, any move toward proportional representation obviously constitutes a very real threat to American Jews.

The legal question presented in the case underscored the key difference in the community: whether the Fourteenth Amendment provides the same protection for the majority as it does for the minority. The argument of supporters of the University was that, historically, the equal protection clause was designed to protect only "insular" and "victimized" minorities such as Blacks. They maintained that the key to past cases in which the Court has struck down racial classes has been an element of

inferior treatment or stigmatization of a racial minority by the majority. In this case, quite the contrary was intended. The racial classification was designed to *benefit* "victimized" racial minorities. In answer to this, the three Jewish groups who supported DeFunis argued that racial preference is unacceptable regardless of whom it benefits. The most pungent response came from ADL: "For at least a generation the lesson of the great decisions of this Court and the lesson of contemporary history have been the same: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are now to be more equal than others."[7] Herein lies a fundamental legal and social question that remains unresolved. Does our Constitution guard against discrimination against racial minorities only or does it also prohibit "reverse discrimination" against whites? Was the Fourteenth Amendment designed to protect only voiceless and powerless minorities against the tyranny of the majority? How, in fact, in a country where the majority will is said to rule, can the majority be discriminated against? Have we reached the stage in this country where the courts must, in effect, protect the majority from itself? Or, rather, have we come to the point where to fulfill the dream of equal rights for all, we must recognize different rights for different groups?

Is There Such a Thing As Group Rights?

The issue of group rights lies at the heart of the controversy. The Jewish organizations that supported DeFunis are one in rejecting the concept. Rather, they urged vindication of individual rights. For the Jews, who were discriminated against as a group, the remedy was not a group one but an individual one. Jews sought to rise above their group identification and compete solely as individuals. For a variety of reasons, blacks and other racial minorities have been unable to escape the group in a similar manner. Instead, they turned inward toward greater group identification. First came the effort to restore self-dignity through "Black Pride." What followed was a legal and social mobilization to elevate the group as a group. In fact, the basis for this group approach to overcoming the effects of racial discrimination can be found in the *Brown* decision itself. For there, instead of ordering the particular individual before the Court into public school, the Court took the unusual step of postponing action with regard to the individual and instead ordered discrimination against blacks as a group to be terminated.

Jewish Ethnicity and Universal Principles

However, the Jewish organizations go beyond merely rejecting the legal institution of group rights. They are also critical of the ethnocentricity implicit in the very suggestion of group rights. Yet, this natural response has created a serious dilemma for the Jewish community. For at the same time that it opposes the trend toward ethnicity, it is very much a part of this trend. The problem was obvious: how to oppose ethnicity ethnically? In the past, Jews have been able to elevate their parochial concerns into the higher ideology of universalism. They attempted to do the same thing here. They invoked the primacy of the individual and the merit system as universal principles of democracy. Yet, somehow, this time the call rang hollow. For the primacy of the individual and the merit system are not the only universal principles. Moreover, they are principles that have been good for the Jews. The irony was so obvious, that, in the words of one observer, it was beginning to seem as if the merit system was a "Jewish conspiracy." Of course, it is not. But, then, neither is it the absolute value that Jews champion it to be. There are certainly other values competing for a place in society. In this case, some would insist that racial equality must take precedence over meritocracy. Historically Jews have often had to balance universalism and particularism. Only, in this case, the Jewish organizations who supported DeFunis would have it both ways. They object to the trend toward ethnicity. They would see race and religion politically and socially irrelevant. And yet, their universalist stand in this case was determined by particularly Jewish interests.

Of course, the position of the pro-DeFunis forces was probably strategically wise. First, it would have only further exacerbated already strained Jewish-Black relations by emphasizing that Jewish concerns were primary. Second, as the statistics indicate, Jews have nothing to gain by jumping on the group rights bandwagon. Too much insistence upon rights for Jews qua Jews could backfire and turn into Jewish quotas. A taste of this came in January 1973 when HEW issued regulations calling for affirmative action on the part of religious and ethnic groups which had suffered past discrimination. This attempt at a quid pro quo drew attention to the fact that group rights could be a two-way street with potentially devastating consequences for the Jews. Finally, it is likely that the pro-DeFunis position was not merely a stratagem. It can be seen as a difficult, first attempt to articulate the social and legal framework for today's "New Pluralism." For just as Commentary Editor Norman Podhoretz has suggested that Jews must consider policy from the perspective, "Is it good for the Jews?," he has also insisted that society must maintain an "Idea of a Common Culture." The attempt to strike a proper balance between newly invigorated group interests and the interests of society as a whole lies beneath the universalistic rhetoric of the pro-DeFunis Jewish forces.

Moreover, there are many groups as well as individuals who may benefit from a resolution which is couched in terms of universal principles, but which takes account of the interplay of group interests (an approach used by James Madison in his analysis of factions in the *Federalist Papers.)*

After *DeFunis*: Steps Toward Compromise

It is now time to look to the future of affirmative action and the role group interests should play in a democratic society. Although the substantive issues involved are complex and differences of opinion run deep, several current opportunities are promising and must be pursued. After the Court's non-decision in *DeFunis*, leaders of the Anti-Defamation League, American Jewish Committee, American Jewish Congress, NAACP, Urban League, and the Puerto Rican Legal Defense and Educational Fund sent a joint letter to HEW Secretary Caspar Weinberger. They asked him to "direct the issuance of non-

discriminatory guidelines clarifying how educational institutions can best develop appropriate tools for special efforts to recruit persons from previously excluded groups."[8] It is to be hoped that these interested parties will soon sit down together and work out non-discriminatory affirmative action guidelines for admission to colleges and universities. With regard to employment, HEW is about to issue a memorandum to be sent to university administrators. This memorandum, which is currently waiting for the approval of the Director of the Office of Civil Rights of HEW, is expected to help correct questionable practices while at the same time further progress toward integration.

Two recent events give further impetus to compromise on this issue. First, Temple University has agreed to pay an out-of-court settlement of $5,000 to an historian who had been denied an opportunity to compete for a faculty position at Temple's Institute of Pan African Studies because he was white. The case is believed to be the first in which such payment was made. Second, and more significantly, in its July decision in the Detroit school case, the Supreme Court banned the use of city-suburb busing. This decision has been interpreted as both a retreat from the more activist approach and as a recognition that minority rights must be balanced against the rights of the majority as well. The implications of this decision for the next *DeFunis*-type case are clear.

If there is to be compromise, the first step will have to be a turning away from the use of quotas and proportional representation which lies at the heart of the controversy. The Democratic Party has taken just such a step by dropping its quota requirements for its miniconvention scheduled for December of this year and for its 1976 presidential nominating convention. The ground for compromise in the areas of education and employment was suggested in Douglas' dissent. Special efforts can and should be made to help the *disadvantaged*. However, *race* should not be the determining factor.

In fact, it must be kept in mind that the Jewish organizations who supported DeFunis do not oppose affirmative action per se but only its abuse in the form of preferential treatment and quotas. ADL, one of the most vocal of DeFunis' supporters, has recently published a pamphlet on this issue in which it makes its support of legitimate affirmative action programs quite clear: "The League has advocated and supported affirmative action in the form of special compensatory education, in-service training, retraining, apprenticeship, good-faith recruitment efforts, job counseling and placement, and efforts to insure that tests and other qualifying criteria are demonstrably relevant to the performance of the duties involved and are not discriminatory against applicants of particular backgrounds."[9] To underscore their support of legitimate affirmative action programs, most of the involved Jewish organizations joined the recently adopted NJCRAC Joint Program Plan for 1974-1975 in recommending:

> "special provisions be made for compensatory education, training, retraining, apprenticeship, job counseling and placement, financial assistance and other forms of help for the deprived and disadvantaged, to enable them as speedily as possible to realize their potential capabilities for participation in the mainstream of American life."

However, the resolution insists that:

> "The sole criterion of eligibility for such special services must be individual need, the services must not be limited or offered preferentially on the basis of race, color, national origin, religion, or sex."

Finally, recognizing that if merit is to work it must be non-discriminatory, the resolution calls for:

> "An ongoing review of established job and admissions requirements, including examinations and other selection methods, to make certain that they are performance-related and free of bias."

If the events described above have created the proper atmosphere for discussion and compromise, this Joint Program Plan may provide direction for the substance of prospective planning.

Balancing Group Interests and Individual Rights

Concerning the larger problem of balancing group interests and individual rights, here too recent events suggest grounds for compromise. At the recent annual convention of the National Urban League, the Rev. Jesse Jackson urged Black leaders to reassess their emphasis upon ethnicity. "You cannot be against the murder of blacks, you have got to be against murder. You cannot be against robbery of black people, you have got to be against robbery. We've got to move from the ethnic to the ethics, and then to excellence." Rev. Jackson also called for a "summit meeting" to iron out differences that have developed over this issue between Black and Jewish leaders.[10] Leaders of both communities have endorsed the idea of such a meeting. It is to be hoped that such a meeting will be convened in the very near future. It is suggested that, at the very least, the agenda for such a meeting should include:

(1) means of establishing lines of communication so that areas of common interest may be pursued effectively, and, where there are disagreements, differences may be voiced without rancor;

(2) the development of principles of affirmative action that will improve the opportunities of disadvantaged individuals without quotas or preferential treatment;

(3) an attempt to create a political, social, and legal program that could lead to the implementation of Justice Douglas' suggested cultural pluralism, insuring group vitality without institutionalizing group rights.

The controversy over affirmative action has afforded Americans with an opportunity to reflect upon the direction the country should move with respect to matters of race and ethnic origin. Constructive alternatives to quotas and proportional representation must, and will, emerge. But beyond the immediate issue of affirmative action, it may be hoped that representatives of the Jewish community will continue to be aware of the implications of ethnic stances on questions juxtaposing individual rights and groups interests, realizing that the long range interests of the Jewish community will probably require a continuing reappraisal and balancing of those interests.

Notes

1. John Kenneth Galbraith, "The Galbraith Plan to Promote the Minorities," *New York Times Magazine*, August 22, 1971
2. Richard A. Lester, *Antibias Regulation of Universities, Faculty Problems and their Solutions*, p. 63 (1974)
3. *American Jewish Yearbook*, pp. 172-73 (1973)
4. Lester, supra, note 2 at 61
5. Supra, note 3 at 175
6. *New York Times*, June 20, 1974
7. Brief Amici Curiae of the Anti-Defamation League of B'nai B'rith in *DeFunis v. Odegaard*, Supreme Court of the U.S., October 1973
8. *Washington Post*, June 12, 1974
9. Benjamin R. Epstein & Arnold Forster, *Preferential Treatment & Quotas*, p. 13 (1974)
10. *New York Times*, August 2, 1974

Steven Frank, a third-year student at the University of Texas Law School, was an intern this summer with the Institute for Jewish Policy and Planning Research.

Constituent Agencies of the Synagogue Council of America:

Central Conference of American Rabbis
Rabbinical Assembly
Rabbinical Council of America
Union of American Hebrew Congregations
Union of Orthodox Jewish Congregations of America
United Synagogue of America

Analysis is published twice monthly from October to June; questions or comments related to this issue of *Analysis* may be sent to: Institute for Jewish Policy Planning and Research, 1776 Massachusetts Avenue, N.W., Washington, D.C. 20036

Recent issues of *Analysis:*

#39 Jewish Academics: New Signs of Life in a "Disaster Area"
#40 The Issues and the Electorate in Israel's 1973 Elections
#41 Jews on an Eastern Religious Quest and the Jewish Response
#42 The Image of the Enemy: An Exploration of Some Psychological Aspects of the Arab-Israeli Conflict as They Affect Policy
#43 The Impact of Government Regulation and Ethnic Consciousness on Jewish Hospitals
#44 On American Might: A New Jewish Position in Light of the October War?
#45 Synagogue Survival Strategies in the Rootless Society: A Case Study

Synagogue Council of America
432 Park Avenue South
New York, N.Y. 10016

NON-PROFIT
ORG.
U.S. Postage Paid
Bronx, N.Y.
Permit No. 802